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Item 2(b) of the provisional agenda
Requests addressed to the Advisory Committee stemming from Human Rights Council resolutions and currently under consideration by the Committee:
Promotion of a democratic and equitable international order

Written statement submitted by the Norwegian Refugee Council, a non-governmental organization in special consultative status*

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[19 July 2018]

* Issued as received, in the language(s) of submission only.

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Request for HRC Advisory Committee Study of Prolonged Occupation and the Enjoyment of Human Rights

1. As the prolonged occupation of Palestinian territory persists, with mounting evidence of the intent of Israel - the Occupying Power - to permanently install the occupation in flagrant violation of international law, legal scholars (including, expert legal advice commissioned by the Norwegian Refugee Council[1]) have raised the question as to whether an occupation that was once regarded lawful (in the sense of a provisional situation regulated by international law), can cross a threshold to become illegal.

2. To that extent, multiple tests could be applied - as suggested by the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, in his October 2017 report the United Nations General Assembly (UNGA) Third Committee.[2]

3. We therefore address the following question to the Human Rights Council Advisory Committee, for consideration under agenda item 2(b) – 'promotion of a democratic and equitable international order'; and pursuant to its mandate articulated in Human Rights Council Resolution 37/23[3] to conduct a study on cooperation in promoting and protecting human rights.

4. We recall that an occupier cannot, under any circumstances, acquire the right to conquer, annex or gain sovereign title over any part of the territory under its occupation. This is a basic tenet of modern international law codified in the prohibition against acquiring territory through aggression and conquest. Further, the Occupying Power cannot impose conditions that are designed to establish a claim for sovereignty. This principle is anchored in the prohibition in International Humanitarian Law (IHL) against the transfer of civilians of the Occupying Power into the occupied territory, and the forcible transfer of the protected population within or outside occupied territory.

5. This prohibition is intended to forestall an occupier from transforming the territory in order to advance its claim for sovereignty, disincentivize the unwarranted prolongation of occupation and, simultaneously, promote the enjoyment in full of the human rights of the population under belligerent occupation.

6. Because of the absolute prohibition against the acquisition of territory by force, the Occupying Power is prohibited from ruling, or attempting to rule, the territory on an indefinite basis. Temporality, together with the principle of non-acquisition of territory by force, is what distinguishes occupation from conquest, and this distinction would be thwarted were the occupation be construed or conducted as permanent, to the detriment of respecting, protecting and fulling the gamut of human rights.

7. Taken together, measures adopted by Israel[4] amount to a policy designed to create a coercive environment which would permanently transform the occupied Palestinian

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[1] https://www.nrc.no/globalassets/pdf/legal-opinions/bothe.pdf.

[2] http://undocs.org/A/72/556.

[3] https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/085/27/PDF/G1808527.pdf?OpenElement.

[4] These practices include the destruction – or threat of destruction – of homes, schools and livelihood shelters; promotion of plans to forcibly transfer communities to urban townships; restrictions on access to natural resources; the denial of basic service infrastructure; and the lack of secure residency, administrative and "punitive" revocations of residency in East Jerusalem, and increasing movement restrictions parts of the West Bank; which gives rise to the risk of forcible transfer of communities from their homes and lands, in violation of international humanitarian and human rights law. These are often implemented against a backdrop of the establishment and expansion of Israeli settlements.

territory in favour of Israeli territorial interests; thus, amounting to the de facto annexation of major parts of Palestinian territory, in violation of the principle of the provisional character of occupation.

8. The de facto annexation of Area C of the West Bank, the formal annexation of East Jerusalem, and the severance of the Gaza Strip violate the rule of the jus contra bellum, which prohibits the acquisition of territory by the use of force amounting to a form of aggression.

9. Moreover, a continued policy of effectively blocking negotiations between the parties aimed at ending the conflict and brining occupation to an end is undermining the viability of a Palestinian State, and has the same effect and therefore falls under these prohibitions.

10. Due to the fact that many of the norms, which have been violated by Israel, apply erga omnes5, and in the light of the obligation of States parties to the Geneva Conventions to ensure the respect thereof, Third States have the legal duty to take measures in order to induce Israel to comply with the relevant obligations.[6]

11. We recall that in 1971, the International Court of Justice (ICJ) issued an advisory opinion on Namibia7, on the legal consequences of the continued presence of South Africa in Namibia. The Court determined that South Africa's administration of the mandate for Namibia had breached several fundamental obligations under international law, that it had been validly terminated by the United Nations and that South Africa's continued presence in the territory was thenceforth illegal.

12. In 2004, the ICJ, in the advisory opinion on the Construction of a Wall8, relied upon the advisory opinion on Namibia with respect to its findings. The similarities between the two situations means that the legal precepts pertaining to the illegal continuation of a mandate may apply, to the determination of whether an Occupying Power's ongoing occupation has become illegal.

13. Accordingly, no territorial acquisition or special advantage resulting from aggression shall be recognized as lawful. If the prolonged occupation of Palestinian territory will be deemed unlawful -by way of an Advisory Committee study on the legality of Israel's continued occupation of the Palestinian territory and other scholarly work to this effect; an international responsibility to supress the violation would rise to bring it to an end in its entirety, rather than certain elements only, allowing for the realization in full of the social, economic, cultural, civil and political rights of Palestinians under belligerent occupation.

14. A study of Israel's role as occupant and a possible determination that it is illegal and constitutes a form of aggression would serve several significant purposes. Firstly, it would enable the international community to review its various forms of cooperation with the Occupying Power as long as it continues to administer the occupation unlawfully or demonstrates no intent to reverse the adverse impact of unlawful occupation. Secondly, it would provide a precedent for the international community when judging other occupations

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[5] The obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to Self-determination and certain of its obligations under international humanitarian law, as expressed by the International Court of Justice in its Advisory Opinion on the Wall. See: http://www.unrod.org/docs/ICJ-Advisory2004.pdf.

[6] For a detailed discussion see: https://www.nrc.no/globalassets/pdf/legal-opinions/sassoli.pdf and https://www.nrc.no/globalassets/pdf/legal-opinions/bothe.pdf.

[7] http://www.icj-cij.org/files/case-related/53/053-19710621-ADV-01-00-EN.pdf.

[8] http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf.

of long duration, in the interest of international rule of law. Belligerent occupation leading to annexation by the use of force of the territory of another State would constitute an act of aggression and a crime against international peace, as well as outright negating the enjoyment of universal human rights.

15. Such determination would give effect to the international law on State responsibility (as manifested by ILC Articles[9] and CA1 to the Geneva Conventions[10]), spelling out the specific consequences of a serious breach of peremptory norms. States would be obligated to cooperate to bring to an end (through lawful means) the breach of a peremptory norm of international law; neither recognize as lawful a situation created by such a serious breach, nor render aid or assistance in maintaining that situation.

16. The obligation will take the form of an obligation of non-recognition by the international community of the legality of situations resulting directly from serious breaches and the obligation to neither render aid or assistance in maintaining that wrongful situation and taking into account the gravity of the wrongful act and the rights in question resort to lawful countermeasures.

17. The parallel application of human rights law, international humanitarian law and the rules of jus contra bellum as well as self-determination renders the procedures established for the implementation of human rights a useful instrument for remedying certain negative effects of prolonged occupation.

18. In reference to the protracted and abusive character of the occupation of Palestinian territory, and in line with recommendations made by the UN Special Rapporteur to the UNGA Third Committee, The Advisory Committee is asked to consider commissioning a study on the legality of Israel's continued occupation of the Palestinian territory; and the ways and means that UN Member States can and must fulfil their obligations and duties to ensure respect for international law, including the duty of non-recognition, the duty to cooperate to bring to an end a wrongful situation and the duty to investigate and prosecute grave breaches of the Geneva Conventions.

19. We further note that numerous efforts to bring the protracted occupation of Palestinian territory to and ensure the rights of its people have been to date abortive. In the absence of a determination finding prolonged occupation unlawful - through a concerted study - territorial acquisition will proceed unhindered, and the disenfranchisement of Palestinians from their fundamental human rights will continue unabated.

20. The undertaking of a study may very well inform the revitalization of HRC and UNGA resolutions; form the basis of a request to the ICJ for an advisory opinion in this matter; and raise the responsibility on the international community to ensure respect for IHL and IHRL and bring an unlawful situation to an end.

21. Such a study which explore the issue of unlawful occupant and unlawfully prolonged occupations will reinforce the importance of the framework of international law and human rights as the best method to successfully end the occupation of Palestine and usher in a just solution.

22. We stand ready to provide the Advisory Committee with additional information as requested and look forward to exploring a possible study.

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[9] http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

[10] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD For a detailed discussion see: https://www.nrc.no/globalassets/pdf/legal-opinions/eo-common-article-1-ihl---boutruche---sassoli---8-nov-2016.pdf.